Farley Candy Company *and* Chemical & Allied Product Workers Union, Local No. 20, affiliated with International Union of Allied, Novelty and Production Workers. Case 13–CA–28528

December 10, 1990

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On June 22, 1990, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the judge's recommended Order as modified.[3]

The Respondent has excepted, inter alia, to the judge's finding that the work stoppages on February 3 and 4, 1989, were not unprotected partial or intermittent strikes. We find the Respondent's argument in support of this exception to be unpersuasive. On February 3, the employees in the Respondent's pan department briefly stopped work in an attempt to meet with plant management to raise a question about wage rates and to demand higher wages and less scheduled overtime. The Respondent gave an answer to the wage rate question, but declined to grant a wage increase, and the employees returned to work. Later that same day, the Respondent's packaging department employees also stopped work and sought out plant management to ask about wage rates and to demand improvements in wages and hours. In response to this stoppage, the Respondent promised to consider the request for a wage increase and agreed to reduce the packaging department employees' scheduled workshift from 12 to 8 hours for the following day, Saturday, February 4. On February 4, pan department employees, including Espinoza and Silva, stopped work at the same time as the packaging department employees, refusing to work their full shift, in support of their prior concerted demands. Seven employees were terminated on February 6 and 7; five from or assigned to the packaging department, and Espinoza and Silva from the pan department.

We find that these employee actions did not constitute a partial or intermittent strike, i.e., a plan to strike, return to work, and strike again. Thus, we find no evidence to indicate that the five terminated packaging department employees who only stopped work once, on February 3, intended to or did engage in a partial or intermittent strike. In this regard, we particularly reject the Respondent's assertion that a plan to conduct intermittent strikes may be inferred from the fact that, when interviewed by the Respondent, five of the terminated employees stated that they still desired a wage increase and a reduction in their 70-hour workweek.

Although pan department employees Espinoza and Silva also engaged in a work stoppage on February 4 (in addition to their activities on February 3), we view their decision to leave work early on February 4 not as an intermittent strike, but rather as a reaction to the Respondent's decision the previous day to address the packaging department employees' demands after refusing Espinoza's and Silva's earlier, similar request on behalf of the pan department employees. See *City Dodge Center*, 289 NLRB 194 (1988), enfd. 882 F.2d 1355 (8th Cir. 1989). Under these circumstances, we find that the work stoppages on February 3 and 4, 1989, were protected concerted activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Farley Candy Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

[1] The General Counsel also filed a motion to strike the Respondent's exceptions. The General Counsel contends that the exceptions should be rejected because they fail to comply with Sec. 102.46(b) of the Board's Rules and Regulations in that they do not set forth specifically the portions of the judge's decision to which exceptions are taken and they do not designate by precise citation the portions of the record relied on. Although the Respondent's exceptions do not comply in all particulars with Sec. 102.46(b), they are not so deficient as to warrant striking. Moreover, the General Counsel has not shown prejudice as a result of any deficiency. In light of all these circumstances, the General Counsel's motion is denied. *La Reina, Inc.*, 279 NLRB 791 fn. 1 (1986). The General Counsel also contends that portions of the exceptions should be struck because they make factual assertions that are contrary to evidence in the record. We find no merit to this argument.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderence of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence. Similarly, there is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

In affirming the judge's findings, we do not rely on his statement that the Respondent treated employees Espinoza and Silva as voluntary quits. Rather, as stated elsewhere in the judge's decision, we find that the Respondent unlawfully terminated these employees because of their protected concerted activities.

The Respondent has also excepted to the judge's finding that Javier Gonzales is a supervisor. In view of the testimony presented at the hearing and the Respondent's concession on the record that Gonzales was a supervisor, we find no merit to this exception.

[3] We have modified the judge's recommended Order to include the standard cease-and-desist language for the type of violations found in this case.

''b. Discharging or otherwise disciplining employees because they have engaged in protected concerted activities.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate and maintain an overly broad no-solicitation, no-distribution rule.

WE WILL NOT discharge or otherwise discipline you because you have engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL rescind our overly broad and vague no-solicitation, no-distribution rule.

WE WILL offer immediate reinstatement to the persons named below, to their former positions or, if those positions no longer exist, to substantially similar positions, discharging if necessary any employees hired to replace them, and make them whole for any losses they may have suffered as a result of our discrimination against them, with interest:

Ramon Leon	Minerva Flores
Adela Mondragon	Onesimo Rojas
Feliciano Martinez	Enrique Espinoza
Jorge Silva	

WE WILL remove from our personnel records any reference to the discharges of these persons and notify them in writing that this has been done and that the references removed will not be used as a basis for future discipline against them.

FARLEY CANDY COMPANY

Richard Kelliher-Paz, Esq., for the General Counsel.
Robert Mirin, Esq., of Harrisburg, Pennsylvania, for the Respondent.
Michael Gotkin, Esq., of Skokie, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on a charge filed April 5, 1989,[1] by Chemical & Allied Product Workers Union, Local No. 20, affiliated with International Union of Allied, Novelty and Production Workers (Union), the Regional Director for Region 13 issued a complaint and notice of hearing on May 16. The complaint alleges that Farley Candy Company (Farley or Respondent) maintained an overly broad no-solicitation, no-distribution rule, and discharged certain of its employees because they engaged in protected concerted activity in violation of Section 8(a)(1) of the National Labor Relations Act (Act). Respondent's answer to the complaint, while admitting most factual allegations, denies that it committed any unfair labor practice.

A hearing was held in this matter February 28 through March 3, 1990 at Chicago, Illinois. Briefs were received from the parties on or about May 29, 1990. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Farley Candy Company, a corporation, with an office and places of business located at Skokie, Chicago, Zion, and Bedford Park, Illinois, engages in the business of manufacturing candy. Respondent has admitted the jurisdictional allegations of the complaint and I find that it is now and has been at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It was established by competent evidence,[2] and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Complaint Allegations*

The complaint alleges that on or about February 3 and 4, a number of Respondent's employees at its Chicago facility engaged in protected concerted activity, including work stoppages. Thereafter, because of their protected activity, Respondent, on February 6, discharged employees Ramon Leon, Adela Mondragon, Onesimo Rojas, Feliciano Martinez, Enrique Espinoza, and Jorge Silva, and on February 7, dis-

[1] All dates are in 1989 unless otherwise noted.

[2] Local 20 is one of eight locals which make up the Central States Joint Board, which represents members with respect to collective bargaining and other matters affecting their working conditions at a number of employers in a 10-state area. It is a party to a number of collective-bargaining agreements and engages in servicing its membership pursuant to the terms of those agreements.

charged Minerva Flores.[3] Respondent admits discharging these employees, but asserts that its actions in this regard were not related to any protected activity and, to the contrary, were for just cause.

The complaint also alleges that Respondent maintains, in its Spanish-language version, an overly broad no-solicitation, no-distribution rule. Respondent denies this allegation.

B. *The Concerted Activity of February 3 and 4*

Farley manufactures candy at facilities located at Skokie, Chicago, Zion, and Bedford Park, Illinois. The facility primarily involved in this case is Respondent's Chicago plant where it makes jellybeans and similar candies. Many, if not most, of its employees at that facility are Mexican aliens, some of whom were in this country legally and some illegally as of January 1989. On or about February 2, the plant was visited by representatives of the U.S. Immigration and Naturalization Service (INS) who inspected Respondent's personnel records and interviewed certain employees. As a result of the inspection, it was found that a large number of employees did not have proper INS documentation. Some of these employees were arrested or otherwise removed from the plant.

As a result of the permanent loss of these employees, Respondent began hiring new employees. Its starting salary for unskilled new employees at this time was $3.60 per hour and that is what the replacement employees were offered. However, one or more Spanish-language radio stations in the area evidently reported that the Respondent was offering $4.50 to $5 per hour for new employees. This amount was substantially more than existing employees at the Chicago plant had received when first hired and as much or more than they were currently making. These radio reports evidently triggered employee unrest and resulted in the events which led to the involved discharges.

On February 3, there were three employee work stoppages at the plant. One of these job actions involved employees from the pan department and the other two involved packaging department employees. The two departments are about 20 feet apart and are separated by heavy plastic strips used as insulation. On February 3, there were 21 day-shift employees and 21 night-shift employees working in the pan department. The business of Farley is seasonal with the busy season being the period from September through March of each year. During the January—February timeframe involved in this case, the Respondent regularly scheduled two 12-hour shifts per day, 6 days per week. Additionally, there were occasional Sunday shifts scheduled. These schedules applied to both the pan and packaging departments. The shifts involved began about 6 a.m. and ended at about 6 or 6:15 p.m.

1. The pan department work stoppage

In the jellybean manufacturing process, a slurry of cooked raw materials is placed on ''boards'' or molds and allowed to harden somewhat. The resulting product constitutes the jellybean centers which are then ''grossed'' and ''polished'' in the pan department. The grossing process takes place in ''pans,'' which were described as large machines much like revolving cement mixers. The centers are placed in the pans and flavored and colored syrup added, and the contents are revolved as the syrup adheres to the centers. The grossing process takes about 2 hours. If the process is significantly interrupted, the mixture in the pans sticks together and is lost for use as jellybeans, resulting in a monetary loss to the Company. After the jellybeans have been grossed, they are placed in other pans and polished, a process which removes a film left on the beans in the grossing process.

In February, the Company had about 36 pans in the grossing area and 36 pans in the panning or polishing area of this department.[4] In the grossing operation, an employee classified as a grosser is assigned to about six pans, and has a helper assigned to him. Similarly, in the panning operation, one employee called a panner is assigned to a number of pans and has one or more helpers assigned to him.

In the panning department, the line of supervision began with two group leaders, Albaro Sancen and Isidro Segura, who direct the work of the other employees pursuant to instructions given by higher management. They are working leaders and are not considered supervisors. Their supervisor is Plant Superintendent Richard Stengren. In the afternoon of February 3, during a workshift, all of the pan department employees stopped work and went to the office of Stengren. Stengren shares this office with his supervisor, Respondent's director of production, Jim Latham.

This group action originated with employees Jorge Silva and Enrique Espinoza. Silva, an employee since 1984, was employed in the pan department at an hourly wage rate of $5.25 per hour. At a morning break, he was informed by employee Espinoza, an employee since 1982, that he had heard on the radio that Respondent was offering new hires $4 to $5 per hour, as opposed to the $3.35 they had received when they were first employed. The matter was discussed with the other pan department employees and they collectively decided to go to the office to inquire about the matter and to use the situation to ask for a raise. At Stengren's office, only Silva and Espinoza entered and related the employees' concerns.[5] The other employees who had stopped work waited in a group outside the office. Silva and Espinoza may have been the only ones in the group who spoke English.

After explaining their concern about the pay reportedly being offered to new hires, the two employees were told by Stengren that they were mistaken and were shown a pay card for a new hire. This card reflected the normal starting salary rather than the rumored higher salary. However, the employees were not allowed to see the date of hire or name of employee whose salary was represented on the card. The employees then asked for a raise. Stengren declined this request,

[3] Apparently because of problems associated with the U.S. immigration laws, a number of the alleged discriminatees used assumed names while working at Respondent's facility. The names of these individuals as set forth above and in the complaint will be used throughout this decision. However, to allay any confusion on the part of a reader of this record, the true names of those alleged discriminatees going by an assumed name are as follows: Adela Mondragon (Adela Hernandez), Feliciano Martinez (Isidor Melero), and Enrique Espinoza (Gabriel Merino).

[4] The evidence is not clear on this point, and there may have been just 36 pans of both sorts in the department.

[5] Both employees testified that Latham was also in attendance at this meeting. However, I believe the best evidence indicates that he was not. Many of the employees testifying in this proceeding confused the names of the two management officials, calling Latham, Stengren, and vice versa. Considering the language problems involved, I do not consider this confusion at all significant. Stengren described the terminated employees' language proficiency as follows: Silva and Espinoza speak English, Mondragon and Rojas speak a little English, and Leon, Flores, and Martinez speak no English.

the employees apologized for taking his time, and they returned to work. This work stoppage lasted about 10 minutes.

2. The packaging department work stoppages

In February the packaging department employed about 80 people. This department utilizes six to eight machines to pack the finished candy into containers of various sizes, ranging from a 30-pound bulk container to small 2- or 3-ounce packs. The packs are placed by employees into containers which contain from dozens to hundreds of packs. In the packaging department there are machine operators, which is a relatively skilled position. These persons operate a Hayssen packaging machine, which evidently requires substantial training to achieve proficiency. There are also less skilled positions for packers, and employees who handle bulk candy called dumpers.

On February 3, after the work stoppage by the pan department employees, the entire packaging department stopped work and sought out Director of Production Latham, but were told by the packaging superintendent to return to work as Latham was not in his office. Later that day, the 80 packaging department employees again stopped work and Latham addressed them. Latham does not speak Spanish and utilizes an interpreter to speak with the employees. On the occasion in question, Javier Gonzales, a supervisor in the packaging department, served in that role. Anything said by the employees at this meeting in Spanish was not understood by Latham unless Gonzales translated. Because of the large number of workers who had been forced from the plant by INS, a number of the packaging department workers were new hires. Latham estimated that they would have made up less than one-half of the packaging department complement on February 3. The gathered employees asked Latham whether new hires were receiving higher starting salaries than they had received when they were hired. Through various individuals who spoke out, they also asked for a raise in pay, complained about the length of shifts, and pay for Saturday and Sunday work.[6]

Several of the employee witnesses who attended or overheard this meeting testified that Latham responded to the employee concerns by telling them that he would talk with higher management about the requested raises and report back to them on the following Tuesday. He also agreed to reduce the number of hours to be worked by packaging department employees the next day, Saturday, and eliminated the work schedule for that Sunday. Latham did not remember making such a response. I credit the employee witnesses' version of Latham's response. He was shown to have authority to recommend raises for employees and to independently set production standards and hours for employees. The record reflects that the packaging department schedule for the next day was changed to an 8-hour shift instead of the normal 12-hour shift.[7] After Latham's meeting with these employees, they went back to work and completed their shift. They also completed their Saturday shift, stopping work about 2:30 p.m., rather than at the normally scheduled time of 6 p.m.

3. The Saturday walkout by the pan department

On Saturday, February 4, the pan department employees stopped working several hours before their shift was scheduled to end and left the plant. The pan department employees were scheduled to work from 6 a.m. to 6 p.m. About 12:15 p.m., Stengren was in his office and group leader Sancen came in and told him pan department employees were going home.[8] Sancen did not know why the employees were leaving. Stengren left his office and went to the pan department. He testified that he found just a few of the department's employees still there, and the pans had been shut down with candy still in them.[9] He then proceeded to the employee locker room where he encountered a number of employees, many of whom he did not know as they were newly hired employees. He did recognize Sancen and the two employees he had spoken with the day before, Silva and Espinoza. He asked Espinoza why he was going home, and Espinoza replied, ''Well, we just want to go home.'' Stengren then testified that he asked group leader Sancen why he could not get the employees to stay and Sancen said, ''[W]hat am I supposed to do?''

According to Silva, the purpose of the work stoppage was to put pressure on the Respondent to give the workers a raise. He testified that he and Espinoza encouraged the job action. Silva testified that it was his understanding that if the pan department engaged in a walkout or other job action concertedly, the Company could do nothing about it. He believed the Company would have to give them the requested raise in order to have its candy produced.[10] The walkout might well have been precipitated or at least encouraged by the fact that the packaging department employees were being allowed to leave work early. The timecards introduced in this record reflect that the pan department employees who walked out left about the same time as the packaging department employees. Shortly after the work stopped he and other pan department employees were approached by Stengren and Supervisor Segura. Stengren asked why they were not working when the shift was not scheduled to end until 6:15 p.m. No one answered. He testified that Segura then asked if the employees wanted to go home, and Silva said yes. Segura then said, ''There he go.''[11]

[6] As will be noted later, several of these employees who spoke out were remembered by Latham as having done so at the time they were discharged.

[7] As pertinent, Mondragon, Flores, Leon, Martinez, and Rojas were all packaging department employees or assigned to that department. Silva and Espinoza testified that they overheard this meeting. There is also some disagreement as to when the shift ended on Saturday, with the employee witnesses testifying that it ended about 2:30 p.m. and the management witnesses contending that it ended about 12 or 12:30 p.m. The employee timecards indicate the correct time to be 2:30 p.m.

[8] The 28 pan department employee timecards show that 15 employees did not punch in or out, 8 employees punched out at approximately 2:30 p.m., and 5 worked until approximately 6 p.m. Further, only one timecard from the group of five cards punched out at approximately 6 p.m. indicates that an employee punched out at approximately 2:30 p.m. and returned to work.

[9] Both Silva and Espinoza were responsible for certain pans on this day. They both credibly testified that they left no candy in their pans when they ceased work on February 4.

[10] Silva recalled an incident at Respondent's Skokie plant where he worked shortly after becoming employed by Respondent. There the pan department employees went to management asking for a raise. The request was refused and no employee was disciplined because of the incident.

[11] This statement attributed to Segura is an obvious error in the transcript and I do not have independent recollection of what the witness actually said. However, this conversation did not play a role in the discharge of Silva and is not deemed significant in that regard. However, both Silva and Espinoza testified that this encounter with Stengren also involved group leader Segura, whereas Stengren remembered it was with group leader Sancen. I consider this to be significant because Sancen was only given a 1-day suspension for stop-

Stengren then tried to call his supervisor, Latham, but was unable to reach him. An attempt to reach higher management also failed. While he was on the phone he observed employees leaving the locker room and going to the timeclock to punch out. Stengren left the phone and went to the timeclock area, where there was a group of pan department employees. In this group the only employees he knew were Espinoza, Silva, and another employee called Toro. In English he told the entire group that if they left, it was like they were quitting their employment. There was no response from the group of employees who left. However, Toro came back and asked him what he should do. Stengren replied, ''Well, all I can tell you is these people will be taken care of Monday. We will make some decision. As far as I am concerned, when somebody punches out when they are not supposed to, and goes home. Well, to me, it is considered quitting.'' He then asked Toro to go out in the parking lot and try to persuade some of the departing employees to return and salvage the candy left in the pans. Toro went to the parking lot and returned with six or seven employees Stengren did not recognize. They went to the pan department and straightened up, so that no candy was lost. Toro and the other returning employees finished out the shift.[12]

C. *The Interviews with Employees on Monday, February 6*

1. Respondent's reasons for the interviews and its decision to discharge and/or discipline

On Monday, February 6, a management team consisting of Stengren, Latham, Vice President of Manufacturing Glenn Brown, and Packaging Supervisor/Translator Jose Lopez met with certain employees who had engaged in the concerted activity of February 3 and 4. Stengren testified that the employees, about 20 in all, were called in to ''see what the big problems were.'' He testified that the employees complained primarily about the fact they had heard on a radio station that the Company was hiring new employees at $4–$5 per hour. Additionally, some complained about having to work on Sundays. Stengren testified that in general, Respondent terminated the alleged discriminatees because, ''These people, we felt that just by talking to them that they were disruptive. They did not like the money they were working for. Some of them didn't like to work the Saturdays. Some of them didn't like to work the Sundays, which were not that often. I think at that time we did work a few, but not that many. And we figured that we didn't want anymore work stoppages, because we can't afford to have them. We were busy.''

With respect to the employees who participated in the work stoppages and who were interviewed on February 6, but who were not disciplined in any way, Stengren testified, ''[W]e took them in my office, and nobody seem to be disagreeing with anything. The wages, they didn't complain about. We told them about the $4 to $4.50 on the Spanish radio. And there was no complaint about that. And they agreed they were going to go back to work, and no problems.''

Latham testified that the employees were terminated because they did not want to accept company policy and it looked like they were going to be disruptive. He stated that the management team talked to 15 to 20 employees and most were agreeable to company policies, but some of the people were argumentative and would not accept these policies. He said that the persons interviewed were allowed to ask questions at the meeting. He did not recall any of the employees interviewed saying that they were speaking on behalf of a group. He testified that personal wages was the main concern of those employees interviewed, with some concerned about the hours of work on Saturday and Sunday. What the employees said in their interviews was a part of the decision on whether or not to terminate the employees. Management did not terminate interviewed employees who were not argumentative and whom management felt would not repeat another work stoppage and would adhere to company policy. It did terminate those employees who they felt would not adhere to company policy and would be disruptive.

Stengren testified with respect to the selection process for interviews on February 6, ''We didn't have any specific reason for any of them. We just pulled [them] in to find out what the problems were, and what they were and why they did this. There was no special [reason].''

Latham agreed that the persons selected to be interviewed from the packaging department were taken at random with no particular reason for selecting a particular employee. He testified that management did not call in all employees who had participated in the work stoppages to see if any others shared the bad attitude traits with those employees terminated because they felt like they ''had the issues.''

After the terminations were final, Stengren talked with Respondent's personnel department and with its general counsel, Michael Gotkin. Respondent's General Counsel Gotkin testified that he learned of the firings after they had taken place. He testified that he conducted an independent investigation, talking to a number of management individuals inside the Company. Gotkin originated the language shown on the individual employee's termination reports as the reason given for termination and the additional comments based on this investigation. At some unspecified point in time, he asked Stengren and Lopez to write up recollections of what happened and put them in the files. Presumably this is how certain ''notes'' were placed in Mondragon's and Rojas' files. In preparing the language used in the termination reports and directing preparation of the ''notes,'' Gotkin took into account specific kinds of issues and concerns, issues and concerns that Gotkin had either learned or been reminded might be relevant down the road by outside counsel hired for this proceeding. All the material generated by Gotkin was

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ping work on Saturday while Silva and Espinoza were terminated for this action. Respondent's reason for the disparate treatment was that Sancen was not told by Stengren not to leave whereas Silva and Espinoza received such instruction. No discipline whatsoever was given to Segura, although he too evidently left work on Saturday and did not return. Thus either Sancen received instructions not to leave and did so, and received disparate treatment, or Segura received the instructions and left and received disparate treatment, no punishment at all. Espinoza also testified that Stengren in this conversation or one shortly after, but before he left the plant, told him that he was going to give him a shorter shift and would not give him any more Saturday work. This testimony was not contradicted; however, I do not credit this assertion. It would have been very difficult, if not impossible for management to give one employee a different schedule than the other employees on his shift. Moreover, Espinoza was shown to have wanted to work as many hours as possible because he needed the pay.

[12] Stengren testified that at the time of his encounter with employees at the timeclock, Sancen had left. Stengren did not identify the number of employees he threatened with discharge nor whether the employees retrieved by Toro were among the group. There was no showing that Stengren at any time attempted to ascertain the identity of these employees or determine whether they spoke English.

placed into the personnel files after April 27, a date subsequent to the filing of charges in this proceeding.

In this regard, the ''Reason for Termination'' and ''Additional Comments'' sections of the termination reports for employees Jorge Silva, Enrique Espinoza, Onesimo Rojas, Minerva Flores, and Feliciano Martinez are virtually identical. These entries, generated by Counsel Gotkin, read as follows:

> Reason for Termination: Disruptive and threatened not to work if he [she] did not get a raise.
>
> Additional Comments: He (she) was informed that there had been no change in starting salaries or raise policies since he (she) started to work. We did not believe that he (she) represented any group of individuals asking for an increase in pay, but he (she) was merely trying to get an increase in his (her) own personal pay before he (she) was entitled to do so.

It must be noted with respect to Respondent's contention that the terminated employees did not want to work or to continue to work under existing conditions that all of them reported to work on February 6, or in the case of Flores, on February 7, and none of them requested to speak with management or volunteered to management before their interview that they had any intention of quitting.

Employees Pablo Calderon, Dagoberto Ramirez, and Agustin Ayala are machine operator group leaders in the packaging department. They were given 1-day suspensions for their part in the work stoppages. Stengren testified that these three employees were not terminated because they were forced to shut down their machines when the packers quit packing. About four to seven packers are assigned to each packing machine. The reason they were given any discipline was that management felt they should have been able to control the packers working on their machines. Machine operators are not considered supervisors by Respondent. Panning department group leader Albero Sancen received similar discipline for his part in the stoppages. Stengren testified that he was not fired for leaving with other pan department employees in the Saturday walkout because he was not specifically warned, as were certain other employees. None of the group leaders named above expressed any dissatisfaction with the Respondent's wages or policies in their interviews.

Latham testified that management did not talk with all machine operators on Monday, that they were selected at random. However there were only six or seven packing machines at that time and so only six or seven operators were on the shift at which the work stoppage occurred. He talked with the following machine operators: Agustin Ayala, Jesus Nava, Dagaberto Ramierez, Pablo Calderon, Ramon Leon, and Onesimo Rojas. Other machine operators mentioned in the record are Ernesto Arias and one called Olvero. It was not shown whether these two were called or not.

With respect to the terminations, no consideration was given to the employees length of service or prior record with the Company with regard to disruptive behavior. At the Company's Belmont plant, there were also work stoppages on February 3. There is no evidence that any employees were disciplined for participation in those job actions. According to Latham these stoppages occurred because of employee concerns over the wage rate being paid to new hires.

Other than the employees named above who were terminated or given a 1-day suspension, four other employees were interviewed on February 6 and given no discipline. Stengren testified that these individuals were forced to participate in the work stoppages; however, no explanation was given as to how or by whom they were so ''forced.''

2. Evidence relating to individual discharges

In addition to the evidence discussed above relating to the disciplinary action in an overall context, relevant evidence was adduced with respect to the specific interviews with the discriminatees and specific reasons for their discharges. This evidence will be discussed below under subheadings for the involved employee or employees.

a. *Adela Mondragon*

Adela Mondragon was first employed by Farley on August 10, 1987. She worked in February 1989 as a packer in the packaging department. She was assigned to help on the packing machine operated by Agustin Ayala. She testified that on February 3, the packaging department went to the office to ask for a raise, but were told to return to work which they did. Later, Jim Latham came and addressed the department. Through an interpreter, he asked what was wrong. One or more employees said that they wanted to talk about a raise and about better working conditions. She testified that Latham replied that he could not grant a raise and would have to talk with other people. He also said the work hours were final.

On February 6, Mondragon learned in the morning that two fellow employees had been fired. She was then called to the office for an interview and asked if she had participated in the group action on Friday. She said that she had done so to ask for a raise. Brown then told her she was suspended for the rest of the day. Mondragon said she was sorry she had participated in the group activity. She then went home. At 4 p.m. that day, she was called at home by Lopez who told her that the Company had decided that she was motivating and encouraging the group and she was fired.

Regarding Mondragon, Latham testified that he remembered her from the Friday packaging department meeting. He remembered her saying that she did not want to work the 12 hours and wanted double time for Sunday. Regarding the Monday interview session, his recollection of specific statements was vague, but he remembered that she thought she should get more money and that she did not want to work on Sundays for less than double time. Latham remembers telling her that ''When we hired these people, we tell them that if you don't want to work long hours, and you don't want to work an occasional Sunday, then Farley Candy is not the place to work.'' He said she was not satisfied with this answer and renewed her request for a raise. He stated that she was persistent. He also testified that she was not suspended as she testified, but was terminated at the time of the interview. This testimony is contradicted by ''notes'' allegedly made of this meeting by Stengren and lends credibility to Mondragon's version of the events surrounding her discharge. Further, given the difficulty that Respondent's witnesses exhibited in remembering specifics of the employee interviews, the fact that I find the ''notes'' of Mondragon's interview were made at a time after the interview, and the

fact that I find her a more credible witness than Respondent's management witnesses, I credit Mondragon's version of the events in question over that given by Respondent's witnesses. Specifically, I credit her testimony about Respondent's motivation for her termination as related to her in her conversation with Supervisor Lopez, who was not called as a witness.

The reason given on her termination report for her discharge is ''threatened to walk out if she did not get a raise.'' Notes of Mondragon's interview, taken by Stengren state:

> This employee was interview[ed] at 9:26 a.m. February 6, 1989. She was a packer in the packaging department. She stated *she wanted more money for herself and for other people in the packaging department* since they worked harder than anyone else in the Company. She said she would like to work but that she intended to walk out if she did not get an increase in pay. She appeared to be very determined.
>
> We told her that she had been misinformed if she had heard any information on the Spanish language radio stations saying that new employees will receive more money. We told her that our starting salaries had not changed and that all people would be judged with their regular salary reviews and for merit increases. She still stated she was not satisfied. We therefore determined to initially suspend her and we later decided to terminate her as an employee, since it was obvious she did not have any intention to return to work and was disruptive to her fellow employees. It was our opinion that she was acting only for herself and not on behalf of her fellow employees.

Stengren testified that Mondragon ''was the one that the attitude and the problems she had was with the money. And she just didn't want to follow our company policies, how we were giving money, we give our annual raises. But she didn't want to follow our policies. So we felt that the only alternative we could do [was to fire her].'' He further testified that she did not indicate a willingness to work under the wages, hours, and conditions that prevailed in the plant.

As noted, Latham testified that the employee interview selection process was a random one with respect to the packaging department employees. In response to the question of whether Mondragon, and presumably any other packaging department employee, had not been selected for an interview, would she have been terminated, Latham responded, ''Probably not.''

b. *Ramon Leon*

Ramon Leon was a packing machine operator. Stengren prepared notes of the interview of Ramon Leon which state:

> I attended a meeting with Ramon Leon. Also present was Glen Brown, Jose Lopez and Jim Latham. This employee was interviewed at 1:24 pm on Feb. 6, 1989. He is a Hayssen machine operator.
>
> He stated that he had been informed by a Spanish-language radio station that we were hiring new employees at between $4 and $4.50 per hour. He said he was very upset by this fact and *he want[ed] 50 cent hourly increase for himself and for others in his department.* We informed him that this information that he heard over the radio was totally incorrect. That we had not changed our initial starting salaries from $3.60 per hour. This was the amount we paid people who had no level of skills as an incoming wage. He stated that since the Immigration had come in and we were low on people he wanted to get a raise and he wanted double time for Sunday. We felt that after we explained to him he was misunderstanding, and that in fact we only paid time and one half overtime pay for Sundays, he further stated that he was not satisfied and he felt he would walk out if other employees walked out with him.
>
> In an effort to retain him as an employee we offered him a 50 cent hourly increase after the next two months had passed. This would represent about a 6 month acceleration in the time he would normally come up for such an increase in a regular review. This, he refused.
>
> We felt he was disruptive and did not desire to go back to work under the same working conditions as other employees. We did not believe he was sincere or truthful in his claim to represent any other employees who felt the same way. He did not say that he represent any other employees who felt the same way. He did not say that he represented any union, was organizing for any union and he had no written petition to represent any other employee.
>
> Since he also threatened a slow-down by himself, we terminated him at 2:05.

I believe these notes were prepared some time after the interview with Leon as they clearly appear to be prepared for defense of the charges filed in this case by the Union. They address legal issues of protected concerted activity and union activity. Stengren testified that management had no knowledge of any union activity at the time of the work stoppages and the terminations. Indeed, there is no credible evidence in the record that the Union was attempting to organize at the time period in question. Thus, it appears to me that the reference to union activity was prompted by the filing of the charges by the Union. I believe that an after-the-fact reconstruction of events such as the ''note'' above are actually more a rationalization of why actions were taken and I accordingly view them with some considerable skepticism.

With respect to Ramon Leon, Latham testified that he was called in for the interview and told management he would slow down if he did not get a raise. Management offered him a raise and he refused the raise unless his machine crew also received a raise. At this point they fired him. ''We told him that he couldn't work. That he was going to be disruptive, because he wanted a raise for the people on his machine, too. He felt that they were working hard.''

Mondragon and Leon are the only discriminatees for whom ''notes'' were prepared and I believe that they were the only discriminatees who were actually interviewed in any depth. The other discriminatees appear from the credible evidence to have been summarily terminated upon arriving at their ''interviews.'' Stengren testified that none of the employees interviewed stated that they were acting for a group of employees. This position is obviously contradicted by the only ''notes'' of the interviews and which ''notes'' were ostensibly prepared by him. I believe to the contrary, manage-

ment was seeking out those of its employees who might be leading the other employees or encouraging the employees to seek a wage increase and better working conditions. This belief is supported by the evidence relating to the termination ''interviews'' of the other discriminatees.

c. *Onesimo Rojas*

Onesimo Rojas, a packaging machine operator, testified that on February 3, the machine operators got together and agreed to ask for a raise. At the meeting, Latham said an answer would be given the following Tuesday. He also supported the testimony that the employees only wanted to work 8 hours that Saturday and none on Sunday. On Saturday, February 4, Rojas testified that he was approached by his supervisor, Gonzales, and told not to ask for a raise because he would be fired if he did. On Monday, he was told to go to the office, where he was terminated together with fellow discriminatees Silva, Espinoza, and Martinez. All that was said to him was that he was no longer needed. Rojas had personally asked for a raise shortly before the incidents in question.

Stengren recalled that Rojas was ''probably more objectional [sic] than any of them. That his big complaint was the hours on Saturday. He didn't want to work a lot of hours on Saturday. He didn't want to work Sundays at all. And here again, was the money issue.'' Latham recalled Rojas saying he would not work 12 hours on Sunday without double time pay.

Rojas is one of the employees Latham remembered speaking out in the Friday work stoppage. He recognized Rojas as being a person who stated that he would not work on Sunday for less than double time, and if he did not get a raise, he would not work as hard. At the interview session, Latham testified that Rojas was asked why he deserved a raise and Rojas' reply was that he worked hard. According to Latham, Rojas also repeated his position on Sunday work. I credit Rojas' testimony that he was summarily terminated without questioning. No ''notes'' of this interview session were introduced as they were with respect to Leon and Mondragon. All four of the discriminatees terminated in this joint ''interview'' session testified credibly that they were not questioned, but were simply told their services were no longer needed by Farley. I believe that Rojas was terminated because Latham did in fact remember what he said in the Friday work stoppage and considered him a leader or instigator of the job action. This view is further supported by Supervisor Gonzales' warning given to Rojas on Saturday. Gonzales did not testify in this proceeding.

d. *Jorge Silva and Enrique Espinoza*

On Monday, February 6, when they reported for work neither of these employees' timecards was in its normal place. They went to Supervisor Segura, who had them and did not want to give the cards to the two employees. He then threw the cards at them and told them to punch in, saying that when the ''old man'' comes in, you can talk to him. At their morning break, Silva and Espinoza were told to report to the office. Rojas and Martinez also reported to the office at about the same time. Silva testified that Lopez asked Rojas, ''What did you do?'' Latham then said, ''The company doesn't need you anymore.'' These employees then got their personal items and punched out.

Concerning the Monday interview, Espinoza testified that upon entering the interview, he asked Lopez what was happening, and Lopez responded, ''I don't know what you did,'' and Espinoza said, ''we didn't do anything.'' Silva was with him at this time. Then two other employees arrived, Rojas and Martinez. Latham then told the group, ''The reason for this meeting is to tell you that we don't need your services anymore.'' The employees asked for a reason but were not given one.

Stengren testified that both Silva and Espinoza had a problem with wages, which surprised him as he had spoken with them about this issue on Friday and believed he had straightened out the matter with them at that time. He considered Espinoza ''destructive with the work stoppage.'' Regarding the pan department employees, only Silva, Espinoza, and group leader Sancen were called in for interviews. Latham testified that the only pan department employees called for interviews were those spoken to by Stengren at the timeclock as they were leaving early on Saturday. Latham's view of these employees was different from those in the packaging department as he considered them to have quit. This assertion lacks merit in my opinion as Respondent made no attempt to identify or interview any of the other employees warned by Stengren at the timeclock and as Respondent chose to treat group leaders Sancen and Segura in a disparate fashion. I believe the true reason for the terminations of discriminatees Silva and Espinoza is found in the testimony of Stengren. Espinoza and Silva ''were destructive with the work stoppage'' in that they were the spokespersons for the pan department employees in pressing their demands.

e. *Feliciano Martinez*

Feliciano Martinez was employed by Respondent in February 1989 as a janitorial employee assigned to the packaging department. He left work on Saturday the 4th with the other packaging department employees. He testified that Stengren had told a group of employees leaving that they could be fired if they left. Some then returned to work. On Monday, he was called into the management meeting with Silva, Espinoza and Rojas and told he was no longer needed. Although there was evidence that janitorial or sanitation workers have their own supervisor, it was also noted that their hours were not fixed and they would not necessarily work the hours of the department to which they were assigned. There is no showing in the record as to what hours Martinez was supposed to work on Saturday.

Stengren remembered that Feliciano Martinez did not believe what management told him in his interview and did not agree. He testified that the decision to terminate this employee was made based on his attitude in the interview. He stated that Martinez did not say he was speaking on behalf of a group when he expressed disatisfaction with his wages.

Martinez testified credibly that he was not asked any questions by management in the ''interview'' session, but was summarily terminated together with discriminatees Silva, Espinoza, and Rojas. Therefore, Martinez in my opinion was the unlucky employee who was called in for an interview at the wrong time. He does not fit into any category for termination. He was not terminated for leaving the plant on Saturday after being warned and was not shown to have been rec-

ognized as a person speaking out in the Friday work stoppage. Thus the only reason he could have been fired was for participating generally in the work stoppage and for having been called for an interview at the same time as the three discriminatees that management had targeted for dismissal. His selection for the ''interview'' process may well have been caused by the fact that though he was assigned to the packaging department on Saturday, February 4, he was part of the maintenance department, and had different supevision. Leaving early on Saturday with the other packaging department employees may have seemed logical to Martinez, but would have been noted by his supervisors as he was the only maintenance employee shown to have left work early.

f. *Minerva Flores*

Minerva Flores testified regarding the February 3 packaging department meeting that she together with fellow employees asked for a raise. Latham said he would give an answer about raises on the following Tuesday, and the group agreed that was okay. Flores did not work on Monday, February 6, but reported for work on the February 7. After working about 2 hours, she was told to report to the office where she met with her supervisors, Roger Nineman and Javier Gonzales. Gonzales told her that they did not need her anymore. She asked whether she was being fired because she asked for a raise. Gonzales said that everyone wanted a raise and that she just was not needed anymore. Neither supervisor who interviewed Flores testified and her testimony is not directly contradicted. I find her a credible witness and credit her testimony about the matters set out above.

Latham testified that Minerva Flores was terminated because she insisted on a raise and would not continue working unless she got one. For the same reasons that I do not credit this general assertion with respect to the other packaging department discriminatees, I discredit it with respect to Flores. I do find that she was fired for asking for a raise, but for so asking at the Friday work stoppage, not in the subsequent ''interview.''

D. *Analysis and Conclusions*

As found in detail above, on February 3, virtually all the day shift employees of the Respondent's pan and packaging employees stopped work concertedly. The pan department employees as a group went to Supervisor Stengren's office where, through the two employees shown to speak English, complained of a reported higher starting wage being paid to new hires than existing employees had received, and requested a raise. These complaints were acknowledged by Stengren, who attempted to dispel the employees' concerns about pay to new hires, but did not agree to the requested raise. The same day, the entire packaging department stopped work twice, seeking on each occasion an audience with Director of Production Latham. The first stoppage lasted only a few minutes as Latham was not in the plant. On the occasion of the second stoppage, Latham addressed the assembled employees and through an interpreter inquired as to the reasons for the stoppage. He was told by various of the assembled employees, including several of the discriminatees about the employees' joint concerns about the reported wages being offered to new hires, about the length of shifts, about Saturday and Sunday shifts, about overtime pay for this work, and about the employees' desire for higher wages. In response, he offered to look into the matter of a wage increase with higher management, and acceded to the request for shorter workshift for the following day, Saturday, and for no Sunday schedule that week.

None of these stoppages was shown to involve threats by employees, disruptive behavior by employees, or any sort of danger to the plant or its personnel. They were of short duration, approximately 10 minutes, regarding the pan department and less than an hour with respect to the packaging department. After each, the employees of the affected departments resumed their normal work activities. No threat of reprisal was made by management and on the contrary, the packaging department employees were promised an answer to their requests by the following Tuesday.

On the next day, Saturday, February 4, the packaging department employees were dismissed early, as promised the previous day. The pan department employees, to underscore their unaddressed wage increase request, stopped work and left the plant about the same time. Stengren threatened a group of pan department employees, which included discriminatees Espinoza and Silva, that if they left the plant they would be considered as voluntary quits. The employees in this group left in spite of this threat. A few unidentified pan department employees returned that day at the urging of Stengren and a fellow employee and finished the shift. None of these job actions involved disruptive or abusive behavior by the employees, nor were threats made that such job actions would continue in the future. There was no harm done to the physical plant nor was any such harm threatened. Except for the refusal of the group of pan department employees to abandon their walkout and return to work, all employees engaged in the job actions followed management's directive to return to work when told to do so. Even the walkout cannot be viewed as a particularly disruptive act as the pan department employees left work at the same time as the packaging department employees whose request in this regard had been granted by management. At the time of the walkout on Saturday, management had not addressed the employees' concerns about higher wages, overtime pay, or weekend work, except to give the packaging department employees a shorter schedule for one weekend and promising an answer to the wage request on the following Tuesday. Clearly none of the job actions taken by the involved employees constitute unlawful sit down strikes or other prohibited activity involving seizure of an employer's facilities.

On the following Monday, Respondent's management selected certain employees, including the discriminatees, from each involved department, brought them in for an ''interview'' and discharged or otherwise disciplined those whose answers to questions did not please them.

I find that the work stoppages of February 3 and 4 constitute protected concerted activity within the meaning of the Act.[13] The employees acted concertedly by department and pressed requests for better wages and working conditions. I

[13] See generally *MCI Mining Co.*, 283 NLRB 698 (1987); *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *Daniel Construction Co.*, 277 NLRB 795 (1985); *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Cargill Poultry Co.*, 292 NLRB 738 (1989); *Modern Iron Works*, 281 NLRB 1119 (1986); *Holiday Inn*, 274 NLRB 687 (1985).

further find that General Counsel has made a prima facie case that the discriminatees' protected conduct was a motivating factor in the Respondent's decision to terminate these employees. For the reasons set out both above and below, I find that the discriminatees' protected conduct provided the only motive for their discharges that is reasonably discernible from this record. It is certain that the Respondent has failed to show that the employees would have been terminated in the absence of such conduct, and thus its actions were unlawful. *Wright Line*, 251 NLRB 1083 (1980).

Because of the varying positions Respondent takes on brief, it is difficult to discern what its assertions are in this respect. It does not contend, except with respect to discriminatees Espinoza and Silva, that anything occurred on an individual basis on February 3 and 4 which would result in discipline. Indeed, it did not discipline or even question in any manner the vast majority of employees who engaged in the work stoppages and it offered no evidence of any activity by any packaging employee on those dates, save for voicing a request for higher wages and better hours, as a basis for discipline. With respect to Silva and Espinoza, there is no evidence that they were abusive or otherwise disruptive during the walkout on February 4 or in the meeting on February 3. The employer simply treated them as voluntary quits, which it cannot lawfully do.[14]

As for the other discriminatees, I believe that speaking out at the work stoppage on February 3 or giving the wrong answers at the interviews on February 6 and 7 that determined their fate. At this point one should consider the manner in which employees were selected for the interview process. Save for Espinoza and Silva, who were apparently targeted for discharge before the interview for failing to heed Stengren's warning on February 4, Respondent takes the position that all other interviewees were selected completely at random. If in fact this were the case, then certainly no individual action taken by these employees in the work stoppages was a basis for their discipline. Further, as I have found that discriminatees Martinez, Rojas, and Flores were not questioned, there can be no reason for their discharges other than merely participating in the job actions, a defense not asserted by Respondent. On the other hand, the evidence strongly indicates that management selected employees for interviews based on its belief that those employees interviewed were the organizers or instigators of the work stoppages. For example, I have found that machine operator Rojas was warned by a supervisor that he would be discharged if he continued to press for a wage increase. His credible testimony that the machine operators were the organizers of the packaging department work stoppages is also supported by the fact that management called in most of them for interviews and gave them 1-day suspensions. The relatively light degree of discipline meted out to the machine operators is understandable in light of the difficulty management would face if it had to replace these employees en masse. Further evidence that management was trying to root out the leadership of concerted activity is found in the testimony of Latham, who admitted that he recognized several of the interviewed packaging department employees, including most of the discriminatees from that department, as persons speaking out at the February 3 work stoppage. In either event, whether the selection process was random or if it was purposeful as I believe and find, the end result sought by management was to forcefully and effectively chill the dissent in its employee ranks by punishing those employees it found to desire any change or improvement in existing working conditions.

Although I believe that it is clear from the record that Respondent discharged the discriminatees for engaging in concerted protected activity, I will address the various defenses offered by Respondent for its actions.[15] On brief, the first defense offered is that the only concerted activity taken by the employees was to raise the issue of new hire pay. Respondent does not acknowledge that the other concerns voiced by the employees on February 3 should be afforded the protection of the Act because they were not the concerns of the majority of the employees and were not concertedly made.[16] Thus, having addressed the employees' asserted misconception about new-hire pay, the employer treats all other requests made by the employees as individual only and not protected. It asserts, inter alia, that certain employees piggybacked personal desires for higher wages and shorter hours onto the general concern about new hire wages. Certainly the matter of new-hire wages was the catalyst behind the employees' concerted raising of their concerns. However, the other concerns raised by the involved employees involved protected subjects, wages, and working conditions.

These concerns were voiced collectively in the packaging department work stoppage and on behalf of all the day-shift pan department employees by Espinoza and Silva. There is no credible evidence of record that these two discriminatees were not speaking for all the pan department employees and I find that they were, as they testified. The Respondent has absolutely no way of knowing what the majority of its involved pan or packaging department employees felt about the concerns raised at the work actions because it selected only a few to question about their concerns. Even faced with the hostile environment of a first ever ''interview'' session with high management officials, a majority or near majority of the employees interviewed expressed the same concerns raised in the group actions. Respondent's argument that the interviewed employees' desire for a raise or other improvement in working conditions, being made as necessary on an individual basis, somehow removes the protection of the act from their right to make the request is spurious. I find it disingenuous to assert that if a group demands higher wages and that demand is protected as concerted activity, that protection is lost when individual members of that group voice the same concerns upon being required to take a position about their concerns *by management.*

The Respondent also cites a number of cases for propositions which have no meaning given the facts of this case. It cites Board and court rulings to the effect that employees cannot inflict economic harm on an employer which is unnecessary to legitimate concerted activity, and employees en-

[14] See *Holiday Inn*, 274 NLRB 687 (1985); *City Dodge Center*, 289 NLRB 194 (1988); *MCI Mining Co*., supra.

[15] Further support for the conclusion that Respondent discharged the discriminatees for their protected activity is found in the fact that it did not consider the length of service or prior disciplinary or work record of any of the discriminatees before discharging them.

[16] This contention is wholly without merit. See *Elston Electronics Corp*., 292 NLRB 510 (1989); *Hugh H. Wilson Corp*., 171 NLRB 1040 (1968); *Meyers II*, 281 NLRB 882, supra.

gaging in deceitful, malicious, or disloyal activity lose the protection of the Act. Examples cited of such activity are disloyalty and bad-faith conduct, such as divisive actions directed at irritating and alienating customers and for the purpose of spreading rumors throughout the company. None of Respondent's employees engaging in the work stoppages was shown to be disloyal, deceitful, malicious, or to have taken any divisive actions such as those mentioned by Respondent. Similarly, there is absolutely no evidence of any threatened or attempted sabotage of product by employees, a concern voiced by Respondent on brief.

Regarding all discharged employees except Silva and Espinoza, Respondent contends on brief that they were discharged because they ''articulated personal requests for raises and issues relevant to their individual employment with Farley. Each of these employees directly refused to accept the established company policy regarding wage increases and instead threatened to cease work and/or to terminate their employment unless the company essentially capitulated to their personal requests for pay increases. They indicated no intention to abandon their disruptive unprotected behavior. These employees did not represent the collective interest or concerns of other workers, but rather seized the moment to insist upon improved individual treatment-personal pay increases against the background of an unsubstantiated rumor circulating throughout the workplace. While virtually all the other employees (99 percent plus) accepted Farley's explanations, these employees did not do so nor did they investigate the rumor directly. Instead, management's attempts at dispelling a rumor were met with hostility, insubordination, and ultimatums on the part of these individuals.''[17]

I have found that the employees' demands on February 3 and 4 constituted concerted protected activity and that voicing these demands or concerns in the interview sessions was also protected. I have further found that the Respondent did not know what the majority of its pan and packaging department employees wanted and thus cannot truthfully assert that the discriminatees did not reflect the collective concerns or interest of the other workers in those departments. The only discriminatees that I have found that Respondent actually interviewed, Mondragon and Leon, both expressed the desire for their fellow employees' wages to be increased in addition to their own. Respondent likewise cannot know what the undisciplined employees accept with regard to its policies, only that its disciplinary action against a few has successfully squelched any expression of their feelings. I have also found that the matter of the new hire pay rumor was not the only legitimate protected concern raised by the employees and that management cannot ignore that legitimacy of the other concerns expressed by firing those employees who voiced such concerns.

Again, it must be noted that no employee volunteered to be interviewed or requested the further meeting with management at which disloyal or disruptive statements were allegedly made. All discharged employees showed up for work as scheduled and none gave any indication of a further desire to engage in work stoppages or to cease employment if the matters raised on February 3 and 4 were not addressed. Any such statements, if made at all, were in the context of a management mandated interview when the employee was called in, in Stengren's words, ''to see what the big problems were.'' I do not find from the credible evidence that any discharged employee voluntarily quit Farley's employment, or threatened to cease work. The so-called reasons for discharge, notes of interviews, and comments about the discharges found in the discriminatees files were prepared at the direction of company counsel after the interviews and clearly in anticipation of this legal action. Thus I cannot find that there is evidence that the discriminatees planned or engaged in a series of intermittent strikes against the Respondent. That Respondent chooses to believe that any employee, like the discriminatees, who voices a desire for higher wages or better working conditions, will be disruptive or fail to follow company rules in the future does not make it so.

With respect to Silva and Espinoza, Respondent contends on brief that they were discharged predicated ''upon these individuals' outright insubordination and disruption of the workplace.'' ''Although initially part of a small group, these employees were selected by management to relay information concerning the rumors concerning the alleged statement made on the radio broadcast and did not approach the Company as representatives of any group of employees.'' I disagree and find that in the February 3 work stoppage, Silva and Espinoza did act on behalf of the other pan department employees. Moreover, there is no evidence of record of any ''outright insubordination or disruption of the workplace'' by these employees individually. The only action they took was to speak for their fellow employees and join them in the part day walkout. Respondent's director of production, Latham, testified that they were discharged because they voluntarily quit by ignoring Stengren's warning to that effect when they left the plant on February 4. I have already found this defense wanting, and to the contrary, find that they were terminated as perceived leaders of the other employees in their concerted activity and to restrain or coerce the other employees in their exercise of Section 7 rights.

Therefore based on the evidence I have found credible and for all the reasons set forth above, I find that Respondent discharged the discriminatees in violation of Section 8(a)(1) of the Act.

E. *The No-Solicitation, No-Distribution Rule*

The Respondent takes no position on brief with respect to the complaint allegation that its Spanish language version of its no-solicitation, no-distribution rule is overly broad. Although the question is reasonably close, I believe that in light of Respondent's very serious violation of the Act as found above, abundant caution should be taken to ensure that its employees are correctly advised of their rights in this important regard. The involved rule was posted at Respondent's involved facility in January and February 1989. The rule pro-

[17] The Respondent contends that discriminatees Mondragon and Espinoza would have been discharged at a later date because of INS rules. This has not been established in this record and, in fact, does not seem to be the case. In any event, their INS documentation admittedly played no part in the decision to terminate them and is more properly a matter for consideration in any backpay proceeding held subsequently. Respondent's argument at the hearing that it surely would not have risked liability for firing someone if that person's employment would shortly end anyway is also unavailing. How better to make a point to other employees than to fire one for ''disruptive behavior,'' knowing your backpay liability will be very limited. Respondent also objects to consideration of the case of Leon as he did not appear at the hearing. I believe that Respondent's own evidence about this discriminatee establishes that he was terminated for the same reasons as the other discriminatees and thus Respondent was not unduly prejudiced by his absence.

hibits solicitation during ''horas du trabajo,'' which the General Counsel had translated to ''hours of work.'' The Respondent's translation for the same term is ''working hours.'' Under either translation, the General Counsel contends that the rule is unlawful, as it encompasses nonworking areas of the Respondent's facility. Citing *Our Way, Inc*., 268 NLRB 394 (1983); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978).

In May or June 1989, Respondent distributed a handbook containing revised rules to its employees, including a revision of the involved rule. However, the General Counsel contends that the distribution of the handbooks failed to effectively repudiate the prior overly broad and vague rule, in that Respondent failed to inform the employees that its previous no-solicitation, no-distribution rule was no longer in effect. Further, General Counsel contends that the no-distribution portion of the revised rule is still overly broad. The rule's inclusion of the term ''company premises'' shows that the rule encompasses nonwork areas, and hence, is overly broad. For the reasons advanced by General Counsel set out above, I agree that Respondent violated and is violating Section 8(a)(1) of the Act by maintaining an overly broad and vague no-solicitation, no-distribution rule.

CONCLUSIONS OF LAW

1. Respondent Farley Candy Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Chemical & Allied Product Workers Union, Local No. 20, affiliated with International Union of Allied, Novelty and Production Workers is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act by maintaining and enforcing an overly broad and vague no-solicitation, no-distribution rule.

4. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act by discharging the following named employees because they engaged in protected concerted activity on February 3, 4, 6, and 7, and in order to discourage its employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection:

Ramon Leon	Minerva Flores
Adela Mondragon	Onesimo Rojas
Feliciano Martinez	Enrique Espinoza
Jorge Silva	

5. The unfair labor practices found to have been committed above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent Farley Candy Company has violated Section 8(a)(1) of the Act, I recommend that it be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully promulgated and maintains an overly broad and vague no-solicitation, no-distribution rule, I recommend it be ordered to rescind such rule. Further, having found that Respondent discharged certain of its employees, named above, in violation of the Act, I recommend that it be ordered to offer immediate reinstatement to them to the positions they formally held or to substantially similar positions, discharging if necessary, any employees hired to replace them. I further recommend that Respondent be ordered to make these employees whole for any losses in wages or benefits they may have suffered by reasons of Respondent's unlawful actions. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as described in *New Horizons for the Retarded*, 283 NLRB 11173 (1987).

It is recommended that Respondent be ordered to remove from its personnel records or other records any reference to the discharges of Ramon Leon, Minerva Flores, Adela Mondragon, Onesimo Rojas, Feliciano Martinez, Enrique Espinoza, and Jorge Silva, and notify them in writing that this has been done and the expunged references will not be used as a basis for future discipline against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Farley Candy Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining an overly broad no-solicitation, no-distribution rule.

(b) Discharging its employees because they engaged in protected concerted activity and in order to discourage its employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its overly broad and vague no-solicitation, no-distribution rule.

(b) Offer immediate reinstatement to the persons named below, to their former positions or, if those positions no longer exist, to substantially similar positions, discharging if necessary any employees hired to replace them, and make them whole for losses they may have suffered as a result of Respondent's discrimination against them, in the manner set forth in the remedy section of this decision.

Ramon Leon	Minerva Flores
Adela Mondragon	Onesimo Rojas
Feliciano Martinez	Enrique Espinoza
Jorge Silva	

(c) Remove from its personnel records or other records any reference to the discharges of Ramon Leon, Minerva Flores, Adela Mondragon, Onesimo Rojas, Martino Feliciano, Enrique Espinoza, and Jorge Silva, and notify

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

them in writing that this has been done and the expunged references will not be used as a basis for future discipline against them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under this order.

(e) Post at its place of business in Chicago, Illinois, copies of the attached notice which is marked ''Appendix.''[19] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by it for 60 consecutive days in conspicuous places including all places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(f) The notice will be posted as ordered in both Spanish and in English in order to ensure that it is understood by all of Respondent's employees.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''